No. 83-1261

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM C. LYDDAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner and his wife were not "separated" within the meaning of Section 71(a)(3) of the Internal Revenue Code, and hence that petitioner was not entitled to a deduction for "support or maintenance" payments, where he and his wife continued to live in the same marital dwelling throughout the tax year in question.

2. Whether the court of appeals correctly held that petitioner was not entitled to use the favorable head-of-household tax rates under the circumstances described above.

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OPINIONS BELOW

The opinion of the magistrate is unofficially reported at 49 A.F.T.R.2d (P-H) para. 82-386. The opinion of the district court (Pet. App. 16-43) is unofficially reported at 51 A.F.T.R.2d (P-H) para. 83-446. The opinion of the court of appeals (Pet. App. 3-15) is reported at 721 F.2d 873.

JURISDICTION

The judgment of the court of appeals (Pet. App. 44-45) was entered on November 1, 1983. The petition for a writ of certiorari was filed on January 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner married Patricia Kopenhaver in February 1970 (Pet. App. 4-5). Five months later, Kopenhaver filed a complaint in state court alleging desertion and seeking equitable support for herself and her unborn child (*id.* at 5,

18). In August 1970 she obtained an order requiring petitioner to pay her "the sum of $600 per month as alimony *pendente lite*" (*id.* at 18). In September 1970 petitioner commenced an action for annulment; he subsequently withdrew that action and filed a suit for divorce (*id.* at 19). The various lawsuits were consolidated for trial, which resulted in a judgment of divorce in petitioner's favor in July 1972 (*id.* at 6, 19).

Despite these pending actions, petitioner and his wife continued to live in the same house throughout the 1971 calendar year (Pet. App. 25-26). Although they had separate bedrooms, bathrooms, and refrigerators, all entrances to the house were accessible to both, and both used the common areas on a regular basis (*id.* at 26-27, 30). Petitioner purchased all the household food, maintained the family cars, and continued to name his wife as the beneficiary of his life insurance policy (*id.* at 6). Petitioner and his wife generally minimized contact with each other, but on several occasions ate meals together, shared the family television room, attended social functions together, and hosted dinner parties at their home (*id.* at 30-31). Although there was disputed testimony as to whether they continued to have sexual intercourse, the district court credited Kopenhaver's testimony that they did, albeit "not frequently" (*id.* at 33).

Sections 71(a)(3) and 215 of the Code,[1] read together, provide that a husband may deduct "support or maintenance" payments made to his wife pursuant to a judicial decree, in advance of divorce, provided that the husband and wife are "separated."[2] On his original tax return for

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2]Section 215 permits the husband to deduct "amounts includible under [S]ection 71 in the gross income of his wife." Section 71(a)(3) in turn provides that, "[i]f a wife is separated from her husband, the wife's

1971, petitioner did not claim any deduction under these Sections for the "temporary alimony" he paid his wife during that year (Pet. App. 6). When the IRS asserted a deficiency against him on other grounds, however, he filed an amended 1971 return, followed by claims for refund, asserting that his temporary alimony payments were deductible and that he was entitled to use the favorable head-of-household rates in computing his 1971 income tax (*id.* at ( ).

The Service denied petitioner's refund claims (Pet. App. 6). It took the position that petitioner and his wife were not "separated" during 1971 within the meaning of Section 71(a)(3), since they continued to reside throughout that year in the same marital dwelling. In so contending, the Commissioner relied on Section 1.71-1(b)(3)(i) of the Treasury Regulations, which provides that support payments are deductible only "[w]here the husband and wife are separated *and living apart.*" (Emphasis added.) The Commissioner likewise took the position that petitioner could not use the head-of-household tax rates, since he was married and since his wife was "a member of [his] household" during 1971 for purposes of Section 143(b)(3).[3]

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gross income includes periodic payments * * * received by her * * * from her husband under a decree * * * requiring the husband to make the payments for her support or maintenance," provided that the spouses file separate returns.

[3]Under Section 2(b)(1), a taxpayer may use the head-of-household rates if he "maintains as his home a household which constitutes * * * the principal place of abode" of at least one child, provided that he furnishes over half the cost of maintaining the household, and provided that he "is not married at the close of his taxable year." Under Section 2(c) and 143(b), a taxpayer is regarded as "not married at the close of [his] taxable year," inter alia, if his "spouse is not a member of [his] household" during that year.

Following denial of his claims, petitioner filed this refund suit in the United States District Court for the District of Connecticut. A federal magistrate, upon referral from the district court, determined that the case presented triable issues of fact and accordingly denied the government's motion for summary judgment (Pet. App. 7, 22-23). The magistrate cited *Sydnes* v. *Commissioner*, 577 F.2d 60, 62-63 (8th Cir. 1978), for the proposition that "the phrase 'living apart' itself does not necessarily mean residing in different buildings." The magistrate held that a factual inquiry was required to determine whether petitioner and his wife "[were] indeed 'living apart' while 'under the same roof.' " 49 A.F.T.R.2d (P-H) para. 82-386 at 82-585.

The district court held a two-day trial to resolve the disputed factual issues (Pet. App. 7, 25). It described the trial as "a verbatim replay of the bitter and vulgar consolidated [state-court action] for desertion and support on the one hand, and divorce for extreme cruelty on the other" (*id.* at 25). After reviewing the evidence, the court found that "the facts conclusively prove that [petitioner and his wife] were not separated, nor were they living apart during the calendar year of 1971, but were living together in one home, married, but with hatred and contempt for each other" (*id.* at 34-35). The court accordingly held that petitioner was not entitled to deduct his support payments. The court also found as a fact that petitioner's wife "was a member of [his] household" during 1971, that the marital home "was her only abode during that year," and that petitioner accordingly was not entitled to use the head-of-household rates (*id.* at 37-38).

The court of appeals unanimously affirmed (Pet. App. 3-15). While indicating that the district court's factual findings "would very likely pass muster" under a "clearly erroneous" standard of review, the court of appeals did not decide that point, accepting the government's alternative

contention, rejected by the magistrate, that the issues "should be resolved as a matter of law" (*id.* at 10). In so holding, the court relied chiefly on Section 1.71-1(b)(3)(i) of the Treasury Regulations. It interpreted the phrase "separated and living apart" as used therein to "require[] a geographical separation and [to] mean[] living in separate residences" (Pet. App. 13-14). The court noted that this interpretation offered a "bright line" test — an "easily recognized, quickly applied standard for the tax deduction" — opining that "[a] federal court should not have to inquire into the intimate, sometimes sordid details of a dissolving marital relationship in order to administer federal tax policy" (*id.* at 14-15). For similar reasons, the court also held that a husband cannot qualify for head-of-household tax status when he and his wife occupy the same house (*ibid.*).

ARGUMENT

The decision below is correct. Contrary to petitioner's contention, there is no conflict among the circuits on the questions presented. Those questions, moreover, have little administrative importance. There is no basis for review by this Court.

1. a. The court of appeals correctly held that a husband making temporary support payments to his wife is not entitled to an alimony deduction when he and his wife continue to occupy the same marital residence. As noted above, Section 215(a) permits a husband to deduct "amounts includible under [S]ection 71 in the gross income of his wife." Section 71(a) requires amounts to be included in the wife's gross income in three situations. Section 71(a)(1), originally enacted in 1942,[4] requires a wife who "is divorced or legally separated from her husband" to include periodic payments received pursuant to "a decree of divorce or of

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[4]Revenue Act of 1942, ch. 619, § 120, 56 Stat. 816.

separate maintenance." Section 71(a)(2), enacted in 1954, requires a wife who "is separated from her husband" to include periodic payments received pursuant to "a written separation agreement." Section 71(a)(3), also enacted in 1954, requires a wife who "is separated from her husband" to include periodic payments received pursuant to "a decree * * * requiring the husband to make the payments for her support or maintenance." The latter provision is the one at issue here.

The Treasury has issued regulations interpreting Section 71(a)(3). Those regulations provide that support payments are taxable to the wife, and hence deductible by the husband, only "[w]here the husband and the wife are separated *and living apart.*" Treas. Reg. § 1.71-1(b)(3)(i) (emphasis added). The requirement that a husband and wife be "living apart" in order to be "separated" for purposes of Section 71 is based squarely on the statute's legislative history. The reports accompanying the 1954 amendments state that they were designed to extend alimony treatment to periodic payments made by a husband to his wife "even though they are not separated under a court decree, *if they are living apart* and have not filed a joint return for the taxable year." S. Rep. 1622, 83d Cong., 2d Sess. 10 (1954) (emphasis added).[5] Since the Regulation is neither unreasonable nor plainly inconsistent with the statute — since, indeed, it is soundly based on the legislative history of the statute — it must be sustained. *National Muffler Dealers Assn., Inc.* v.

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[5]The cited passage discusses the meaning of the clause "[i]f a wife is separated from her husband" as used in Section 71(a)(2). Since Section 71(a)(3) commences with precisely the same clause, and since the two subsections were enacted simultaneously as part of the same statutory scheme, the cited passage is equally applicable to them both. The Treasury has always interpreted both subsections to require that spouses be "separated and living apart." Compare Treas. Reg. § 1.71-1(b)(2)(i) with Treas. Reg. § 1.71-1(b)(3)(i).

United States, 440 U.S. 472, 476-477 (1979); *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 533 n.11 (1979); *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948).

b. Petitioner does not appear to contend that the Regulation is invalid in mandating that spouses be "separated and living apart" before the husband may deduct temporary support payments (see Pet. 46-51). Rather, he contends (*id.* at 50) that the court of appeals erred in interpreting that phrase to "require[] a geographical separation and [to] mean[] living in separate residences" (Pet. App. 13-14). In petitioner's view, a husband and wife can be "separated and living apart" even though they both continue to "occupy[] the same residence" that they have occupied throughout their marriage (Pet. 50).

Petitioner's proposed interpretation is at odds both with common sense and with the statutory scheme. Under common English usage, members of a family are not said to be "living apart" when they continue to live in the same single-family home. Under common English usage, conversely, spouses are said to "separate" when one of them moves out of the marital abode. And the structure of Section 71(a) itself suggests that "separated and living apart" means "living in different residences." Section 71(a)(3) permits the deduction of interspousal support payments, even though the spouses are not "legally separated" (as required by Section 71(a)(1)), and even though they have not executed "a written separation agreement" (as required by Section 71(a)(2)), provided that the "wife is separated from her husband." Section 71(a)(3), in short, presupposes some clearly-defined type of "separation" different from that effected by judicial decree or consensual agreement. Unless

Congress had residential separation in mind, it is hard to know what it contemplated in drafting Section 71(a)(3).[6]

c. Finally, as the court of appeals stressed (Pet. App. 14-15), the conclusion that "separated and living apart" means "living in different residences" is supported by strong considerations of tax policy. That interpretation provides a "bright-line" test for the alimony deduction. As noted below, it is a test that is "easily recognized [and] quickly applied" (Pet. App. 14).

The factual approach advocated by petitioner, in contrast, would be exceptionally difficult, if not distasteful, to administer. In order to determine whether an estranged couple "is indeed 'living apart' while under the same roof" (Pet. App. 23, citing *Sydnes* v. *Commissioner*, 577 F.2d at 62-63), a federal district court would have to make "a factual inquiry that probes * * * deeply into the intimate living details of a now-estranged couple" (Pet. App. 15). Since the estranged spouses' interests in the outcome of such inquiry will always conflict — support payments deductible to the husband will necessarily be taxable to the wife — the federal

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[6]Petitioner errs in relying (Pet. 40) on the legislative history of a bill, introduced in 1941 but never enacted, that would have required mandatory filing of joint returns by spouses "living together." The House Report on that bill said that "[a] husband and wife are considered living together in any case where they have not separated with intent to abandon permanently the marital relationship, whether or not the husband made his home at one place and the wife at another place" (H.R. Rep. 1040, 77th Cong., 1st Sess. 10 (1941)). But the legislative history of an unenacted bill can scarcely be relevant to the proper interpretation of an entirely different statutory provision enacted 13 years later. And even if the quoted passage were relevant to the proper interpretation of Section 71(a)(3), it would not help petitioner. The fact that Congress might regard spouses as "living together" even though they occupy different houses, obviously, does not support an inference that Congress would regard spouses as "separated and living apart" where they occupy the same house. Indeed, the inference would be quite the reverse.

court action will tend to become a "replay[] of [a] bitterly contested divorce trial[]" (*ibid.*). Surveying the "complicated and unpleasant factual scenario" of this case, a scenario that "produced a trial described by [the district judge] as a 'nightmare,' " the court of appeals wisely concluded that "[a] federal court should not have to inquire into the intimate, sometimes sordid details of a dissolving marital relationship in order to administer federal tax policy" (*id.* at 14-15). And to hold that a supposedly estranged couple could "live apart" in the same home would also serve to encourage collusive separations. See *Boyter* v. *Commissioner*, 668 F.2d 1382 (4th Cir. 1981) (sham year-end "divorce" followed by immediate remarriage to avoid so-called marriage penalty).[7]

2. Contrary to petitioner's contention (Pet. 15, 25), the decision below does not conflict with *Sydnes* v. *Commissioner*, *supra*. The Eighth Circuit there rejected the Commissioner's contention that the words "separated" and "living apart" as used in Section 71(a)(3) and its interpretive

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[7]Seeking to turn the tables, petitioner contends (Pet. 52, 55) that his interpretation, rather than ours, calls for "an automatic rule" and thus "better serves the ends of administrative convenience." This contention is frivolous. Our interpretation entails no "nightmarish inquiries into the circumstances of deteriorating marriages" (Pet. 51); the only relevant question concerns a single objective fact — whether the spouses have different residences. Under petitioner's interpretation, by contrast, it would be impossible to determine whether spouses are "living apart" in the same home without examining the details of their personal living arrangements and interactions. Petitioner suggests (Pet. 51) that the "existence of a state court order requiring support payments provides a ready test to determine whether spouses are separated," but this test is plainly unacceptable. The existence of a state court order is presupposed by Section 71(a)(3)'s stipulation that there be "a decree * * * requiring the husband to make the payments." The opening clause of that Section — "[i]f a wife is separated from her husband" — imposes an additional and discrete precondition to allowance of a deduction, as the legislative history emphasizes. See, *e.g.*, S. Rep. 1622, *supra*, at 11. Petitioner would simply read that clause out of the statute.

regulations mean "living in separate residences" as a matter of law (577 F.2d at 62). Instead, that court held that "the issue of whether the parties are living separately in the same residence presents a factual issue" (*ibid.*). After reviewing the evidence in that case — including the fact that the divorce court had ordered the estranged spouses to "continue to live separately but in the same home" while divorce proceedings were pending (68 T.C. at 172) — the Eighth Circuit concluded that the taxpayer and his wife, "while living in the same house, were living separately and apart" (577 F.2d at 63), and that the husband was accordingly entitled to deduct his support payments.

It is of course true that the Eighth Circuit viewed the question presented as one of fact, while the Second Circuit here treated it as one of law. But there is no reason to believe that the Eighth Circuit would have decided this case differently from the decision below. The district court in this case held a two-day trial and conducted precisely the kind of factual investigation prescribed by the Eighth Circuit in *Sydnes*. Reviewing the evidence, it found the facts "conclusively [to] prove that [petitioner and his wife] were not separated, nor were they living apart," during the tax year in question (Pet. App. 34). The court of appeals, while not deciding the point, said that these factual findings "would very likely pass muster" under a "clearly erroneous" standard of review (*id.* at 10). Specifically, both the district court (*id.* at 32-33, 36), and the court of appeals (*id.* at 7-8), found that the divorce court here, unlike the divorce court in *Sydnes*, did not "order[] that the parties continue to reside in their house during the pendency of the law suit."[8] Since

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[8]Petitioner urges this Court (Pet. 2, 10-14) to set aside that factual finding as "clearly erroneous," relying on a transcript of the state-court divorce action (Pet. App. 47) in which the judge noted that petitioner and his wife "are going to live together." This transcript was not in the record before either court below and should not be considered here.

the trial court found as a fact that petitioner and his wife were not "separated," there is no reason to believe he could prevail even if his theory of the case were accepted. And since the facts here are distinguishable from those in *Sydnes*, there is no reason to believe that the Eighth Circuit would have decided this case differently than did the court below. There is thus no conflict in the circuits.[9]

3. Even if the circuits were in conflict on the question, the conflict would be of very limited administrative importance. The question whether spouses can be "separated and living apart" while living in the same house has been raised in only six reported decisions since Section 71(a)(3) was enacted in 1954. Aside from this case and *Sydnes*, the only reported decisions are by the Tax Court, three by memorandum, and all rejecting the taxpayer's contention as a matter of law. See *Washington* v. *Commissioner*, 77 T.C. 601 (1981); *Hertsch* v. *Commissioner*, 43 T.C.M. (CCH) 703 (1982); *Brusey* v. *Commissioner*, 50 T.C.M. (P-H) 533 (1981); *DelVecchio* v. *Commissioner*, 32 T.C.M. (CCH) 1153 (1973). The paucity of reported cases, obviously, is not mere happenstance. Common sense suggests that spouses who are truly estranged will rarely continue living together after one has secured a judicial decree of support or separate maintenance.

Even if it were considered, it would not help petitioner, for the statement that petitioner and his wife "are going to live together" obviously does not constitute an order that they do so. At all events, both courts below found as a fact that "[t]he wife's presence was not enforced by court order" (Pet. App. 36), and it is well established that this Court will not undertake to review concurrent findings of fact made by two lower courts.

[9]Nor is there any merit to petitioner's contention (Pet. 16-17) that the decision below is "out of harmony" with *Commissioner* v. *Lester*, 366 U.S. 299 (1961). The question there was whether certain periodic payments were deductible alimony under Section 71(a) or nondeductible child-support under Section 71(b). That question is not involved here.

4. The courts below also held correctly (Pet. App. 15, 35-38) that petitioner was not entitled to use the favorable head-of-household rates in computing his 1971 tax liability. A taxpayer may use those rates only if he is "not married" at the close of the year, a condition satisfied (inter alia) if his spouse "is not a member of [his] household" during the taxable year. I.R.C. §§ 2(b)(1), 2(c), 143(b). The regulations provide that "an individual's spouse is not a member of the household during a taxable year if such household does not constitute such spouse's place of abode at any time during such year." Treas. Reg. § 1.143-1(b)(5). The regulation is neither unreasonable nor plainly inconsistent with the statute and therefore must be sustained. See, *e.g.*, *National Muffler Dealers*, 440 U.S. at 476-477. Since petitioner's household plainly constituted his wife's "place of abode" in 1971, the courts below correctly held that he could not use the head-of-household rates. In any event, petitioner does not allege, nor is there, a conflict among the circuits on the question.[10]

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[10]The Tax Court cases on which petitioner relies (Pet. 58-60) for the principle that there can be more than one "household" in the same place of abode — *Robinson* v. *Commissioner*, 51 T.C. 520 (1968), aff'd in part and vacated in part, 422 F.2d 873 (9th Cir. 1970); *Estate of Fleming* v. *Commissioner*, 33 T.C.M. (CCH) 619 (1974) — are not in point. Neither dealt with the question whether a single-family residence in which a husband and wife live together constitutes one or two "households" or "places of abode."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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